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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In re: **ISABEL ANDRADE, *et al.***

Petitioners

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF THE *AMICUS CURIAE*[1]

In my private practice,[2] I concentrate on matters of legal and judicial ethics. I also frequently lecture on these topics, and have authored a number of articles on attorney and judicial disqualification and related subjects.

I am also the author of Judicial Disqualification: Recusal and Disqualification of Judges, which was published by Little, Brown & Company of Boston in 1996. That treatise, which is nationwide in scope, discusses in detail the principles which have been espoused by the nation's courts in deciding judicial disqualification motions and appeals. I am Vice-Chair of the Alameda County Bar Association Ethics and Professionalism Committee and incoming Vice-Chair of the Bar Association of San Francisco Ethics Committee.

Because of my academic and legal work in this field, I am very interested in and concerned about the development of the law of judicial disqualification. My brief is intended to assist the Court in determining whether either 28 U.S.C. §§ 144 or 455 mandated disqualification of the district judge in these cases; and, if not, whether reassignment or remand would have been appropriate.

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[1] This brief was authored entirely by the amicus curiae; who, as the Court may be aware, is the author of a nationwide treatise on the subject of judicial disqualification, Judicial Disqualification: Recusal and Disqualification of Judges (Little Brown & Co., Boston 1996). Counsel of Record for Petitioners, Caddell & Chapman, made a partial monetary contribution to the preparation of the brief. Pursuant to Rule 37.3 of the Rules of the Court, the parties have consented to the filing of this brief. The letter of consent has been filed with the Clerk of the Court.

[2] I am an attorney-at-law duly licensed to practice before this Court and the state courts of California, New York and New Jersey, the D.N.J., S.D.N.Y., N.D.Cal. and C.D.Cal., and the Fifth, Sixth, Ninth and Federal Circuit Courts of Appeal.

SUMMARY OF ARGUMENT

> "The remedy by appeal is inadequate. It comes after the trial and if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."--Berger v. United States, 255 U.S. 22, 36 (1921).

In Berger v. United States this Court held that if a party timely files an affidavit setting forth facts which, if true, "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," the challenged judge has no discretion to deny the application. Id. at 33-34. Petitioners satisfied the procedural requirements of § 144 by filing affidavits setting forth their reasons for believing the judge was biased against them, as well as a counsel's certificate stating the affidavits were made in good faith. The judge did not deem these to be untimely.[3]

As will be shown, the facts set forth in petitioners' affidavits, if assumed to be true (as they must be), were more than sufficient to "invoke the operation of the act." Id. at 36. The challenged judge, moreover, did not expressly find to the contrary. Instead, in his order denying disqualification he declined to mention the affidavits at all. If Berger continues to have vitality--as this Court's opinion in Liteky v. United States, 510 U.S. 540 (1994) demonstrates that it does--that error should be corrected now, not after trial when the damage to the parties' and public's confidence in the integrity of the judicial system has already been done.

Disqualification was also compelled by § 455(a). Liteky makes clear that a judge's remarks will support a partiality challenge "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible" [Id. at 555]. In denying disqualification, the judge did not explain why the comments he had made about the Branch Davidian sect of the Seventh Day Adventist Church in other cases do not reveal the requisite degree of animosity. As will be shown, the remarks petitioners complain of reveal at

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[3] Likewise, while § 144 on its face calls for only one affidavit in each case, the judge did not decline to consider additional affidavits on this ground.

least as great a degree of antagonism towards that religious group as Judge Landis' *alleged* comments in Berger revealed about German-Americans.[4]

These issues were brought to the attention of the Fifth Circuit by way of a Petition for a Writ of Mandamus. Petitioners requested that the case be reassigned to another judge on remand, arguing that even if disqualification was not statutorily mandated, the cases should have nevertheless been reassigned to another judge in the interests of justice. On June 9, 1997, a Fifth Circuit panel denied the petition without revealing what standard the Court employed in deciding that reassignment would not be in the interests of justice (if such a determination was made at all).

Although the court below did not explain why reassignment would not be just in the circumstances, different circuits have applied different tests for determining whether appellate reassignment is warranted. This split, coupled with the fact that this Court has yet to prescribe the appropriate reassignment standard, has led to much confusion. This is a matter of concern because it appears that reassignment requests are becoming increasingly more common. With *dicta* from Liteky which suggests that it may be easier for a party to obtain reassignment of a federal trial judge on remand than upon direct motion, it may be predicted that, absent guidance from this Court, the number of applications for this type of relief will continue to grow.

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[4] Likewise, the trial judge conveyed favoritism towards the government--even the foreperson of the jury which convicted several Branch Davidians on some charges thought so.

It should be noted, moreover, that were this Court to have permitted Judge Landis to remain on as trial judge in Berger, the fact-finding function would have been insulated, at least to some extent, by the fact that petitioners were entitled to a jury trial. Here the challenged judge is presiding as sole trier of fact on petitioners' F.T.C.A. claims.

REASONS FOR GRANTING THE WRIT

I. DISQUALIFICATION UNDER § 144

A. Historical Background

Edicts designed to assure judicial impartiality have been in place since ancient times.[5] However, prior to 1911 federal law did not prescribe disqualification on bias grounds. In that year Congress enacted § 21 of the Judicial Code of 1911, the precursor to modern day § 144--provided that:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed....

There is little doubt Congress intended the new statute to be peremptory. See, e.g., State of Idaho v. Freeman, 507 F. Supp. 706, 715 & n.8 (D. Idaho 1981). See generally Frank, Disqualification of Judges, 56 Yale L.J. at 628 (1947). However, Congress, worried that such a provision might be susceptible to abuse, engrafted upon § 21 several procedural limitations. See Berger, 255 U.S. at 26-27.

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[5] See, e.g., BABYLONIAN TALMUD, Tractate Shabbath 10a, quoted in 1 E. Quint & N. Hecht, JEWISH JURISPRUDENCE 6 1980 ("[e]very judge who judges a case with complete fairness even for a single hour is One, blessed be He, in the work of creation"). See also, Leubscorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237, 248 (1987).

B. The Berger Case

Congress' first 'peremptory disqualification' statute[6] initially came before this Court in Berger. In that case petitioners submitted, on "information and belief,"[7] a single affidavit in which they opined that Judge Landis was biased against them because they were German, of German extraction, or "impleaded with" those who were. Id. at 28-30. From the comments Judge Landis was alleged to have made, it could be inferred that he was antagonistic to German-Americans because he considered them to be disloyal to the government.[8]

Mr. Justice Day noted in dissent that the statements petitioners attributed to Judge Landis had not been made about petitioners themselves, but during the course of sentencing a different defendant who had been convicted by a jury of violating the Espionage Act. Further, the stenographic report of what the judge said at the sentencing hearing did not reflect that he had actually made the pejorative remarks attributed to him. Nevertheless, a majority of this Court held that the challenged judge had no discretion to deny the motion.[9] It noted that while the moving party's affidavit must give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," the statute "withdraws from the presiding judge a decision upon the truth of the matters alleged." Id. at 33-34, 36.

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[6] As petitioners mentioned in their brief, the House Judiciary Committee is currently considering legislation which would permit litigants to have a case peremptorily reassigned to another district judge without any showing of cause whatsoever, and without the challenged judge having any discretion to deny reassignment. Amendments to H.R. 1252.

[7] Unlike the affiants in Berger, the petitioners here did not merely allege what Judge Smith said merely on "information and belief." Rather, they appended exhibits which set forth those comments.

[8] As this Court noted in Liteky, the judge was alleged to have said, inter alia, that "[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans' because their 'hearts are reeking with disloyalty.' " Liteky, 510 U.S. at 555.

[9] The court also noted that perjury statutes and disbarment proceedings provided sufficient safeguards against abuse.

C. The Affidavits in This Case

Of course no two cases are exactly alike, and the trial judge in this case did not, in sentencing the convicted Branch Davidians, employ the exact same words Judge Landis was alleged to have used in sentencing a convicted German-American. Like Judge Landis, however, Judge Smith did make comments from which it may be inferred that he questions the loyalty of the class to which the decedents and many of the petitioners belong.[10] In fact, Judge Smith not only expressed the belief that the Branch Davidians and their supporters were "disloyal" to the U.S. government,[11] but that they were bent on seeking violent confrontation with it:

> It was a part of the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a violent conflict with federal agents, thereby forcing the agents to use deadly force against them... [12]

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[10] In Berger, petitioners' claim was predicated exclusively on their "information and belief" claim that Judge Landis had previously made comments about a class to which petitioners belonged (German-Americans). The Court did not require them to demonstrate that he had any bias "personal" to them.

[11] During the sentencing hearing in U.S. v. Branch, the following exchange occurred between one of the defense counsel and Judge Smith:

> Mr. Tinker: I do know that you're--as Your Honor mentioned, that members of the public had written in an effort to hopefully assist your honor and--and demonstrate what the public feeling is. Whether or not Your Honor feels that was a concerted effort by people who represent the--the accused and the defendants in this case, I don't know. But, in any event, we know what the jury would do. . . .
>
> The Court: It's a concerned effort by people who are so anti-government that they would take that position anywhere, any time.

Appendix A to Amicus Curiae Brief, pp. 1a. This portion of the record was part of the record before the trial court and before the Fifth Circuit Court of Appeals in petitioners' case.

[12] Joint Petition for Writ of Certiorari ("Joint Petition") Appendix D at p. 26a.

Unlike Judge Landis, moreover, Judge Smith did not confine himself to questioning the *loyalty* of the class. He also made comments expressing disdain for their religious beliefs,[13] as well a very strong opinion of the facts which gave rise to *these* cases.

In United States v. Branch, W-93-CR-046, aff'd in part, 91 F.3d 699 (5th Cir. 1996), he made the following comments, among others:

- "These Defendants, and other adult Branch Davidians, engaged in a conspiracy to cause the deaths of federal agents."

- "... the first shots were fired from inside the front door of the Compound." (i.e., by the Branch Davidians)

- "... by a combination of suicide and murder inflicted by Davidian upon Davidian, all but a handful of the Davidians were killed."[14]

Similarly, in the related case of Risenhoover v. Cox Texas Publications, Inc., *et al.*, W-93-CA-138, Judge Smith made the following comments, among others:

- "While Koresh's religious teaching did not focus on the Golden Rule, it did focus on para-military training."

- The FBI's decision to mount a forceful assault on the Compound on April 19 ended in tragedy, when the building and all but a handful of its inhabitants were consumed in a conflagration set by the Davidians."[15]

The affidavits petitioners submitted in support of their § 144 motion--if true--demonstrate that none of these comments are accurate. For example, while Judge Smith stated that "[i]t was part of the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a

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[13] At one point, for example, he characterized the Branch Davidians' sect leader David Koresh as a "false prophet." Joint Petition Appendix H at p. 57a.

[14] Joint Petition Appendix D at p. 26a.

[15] Joint Petition Appendix H at pp. 56a-57a and 59a.

violent conflict with federal agents...," petitioner Clive Doyle averred that the religious beliefs of the Branch Davidians "never caused us to want or bring about a violent conflict with federal agents, or anyone else," and "David Koresh never preached we should go looking for a fight with anyone." Likewise, whereas the judge opined that "[w]hile Koresh's religious teaching did not focus on the Golden Rule, it did focus on para-military training," Doyle averred that "...[t]he Golden Rule was read and discussed in the Church, probably everyday by someone...[w]e believe in the Golden Rule and try to practice it..." and "[p]aramilitary training was never a part of our religious teaching." Doyle also averred that while Judge Smith has decreed David Koresh to be a "false prophet," the people of his sect continue to believe that "Koresh was a true prophet;" that the Davidians "didn't start" the fatal fire; and that they did not "believe in suicide" and did not "kill each other."[16]

Bonnie Clark Haldeman, David Koresh's mother, also submitted an affidavit. In it she alleged that, contrary to what Judge Smith said, David Koresh believed and frequently discussed the Golden Rule, the Church was not a "fort style" reflection of David Koresh's "apocalyptic mentality," and "[t]he only reason for the existence of our Church was for religious purposes."[17]

Since under Berger § 144 affidavits must be assumed to be true, Mr. Doyle's and Ms. Haldeman's affidavits are more than legally sufficient to compel the district judge's disqualification under that provision. However, petitioners also submitted an affidavit from Sarah L. Bain, the foreperson of the jury which convicted several United States v. Branch defendants of (mainly) firearms violations. Ms. Bain testified that upon attending the sentencing hearing in that case she was deeply disturbed to hear Judge Smith state that the Branch defendants, which the jury had just acquitted of murder and conspiracy charges, had in fact committed murder and conspired to do so, thus "twist[ing] into a reversal of our clear decision that no defendant committed murder."[18] Further according to Ms. Bain, while Judge Smith somehow concluded that the first shots on February 28, 1993 were fired from

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[16] Appendix B to Amicus Curiae Brief at pp. 3a-5a. The Doyle affidavit was part of petitioners' record in the trial court and Fifth Circuit .

[17] Appendix C to the Amicus Curiae Brief at pp. 7a-8a. The Haldeman affidavit was part of Petitioners' record in the trial court and Fifth Circuit.

[18] Joint Petition Appendix K at pp. 65a-66a.

inside the Church, the jury "could not determine and did not decide" this; "[t]he jury did not determine [as Judge Smith did] that Church members started the fire;" "[t]he evidence certainly did not justify calling the Church a fortress;" "[t]here was no evidence to support a claim that all but a handful of the Church members committed suicide or murdered each other;" and "there was no evidence to support [Judge Smith's expressed belief that] nearly all of the 74 deaths were a result of 'suicide and murder inflicted by Davidian on Davidian.'"[19]

If all of Ms. Bain's statements are assumed to be true, neither her expressed belief that "Judge Smith could only make such statements if he bore some prejudice against the defendants and their Church and other possibilities did not matter to him," nor her opinion that "Judge Smith not only ignored our verdict of not guilty of murder but ... misused our jury and verdict to punish people he had come to scorn,"[20] can be discounted. Certainly the comments undeniably made by Judge Smith--at least as much as those that had merely been attributed to Judge Landis "on information and belief"--are of the type which give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

II. DISQUALIFICATION UNDER § 455(a)

A. The Standard for Disqualification Under § 455(a)

Section 455(a) prescribes that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Over the years there has been debate about the point of view from which the question of whether a judge's impartiality might reasonably be questioned is to be determined. However, most courts now appear to agree that disqualification is warranted whenever a reasonable member of the public, if aware of all the relevant facts, would

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[19] Joint Petition Appendix K at p. 66a. The amicus realizes Judge Smith may have been privy to evidence which he deemed inadmissible and which, therefore, never reached the jury. If so, however, the arguments for disqualifying Judge Smith from presiding over these cases would appear to be even stronger.

[20] Joint Petition Appendix K at pp. 65a-66a.

question the judge's ability to be impartial. See, Liljeberg v. Health Services Acquisitions Corp., 486 U.S. 847, 860 (1988).

That a reasonable person would harbor doubts about the impartiality of a judge assigned to sit as a trier of fact who, prior to hearing any evidence in a case, expressed an emphatic opinion about the merits of that case, can hardly be gainsaid. The key question, therefore, is whether the "extrajudicial source" rule provides an exception to § 455(a) in the circumstances of these cases.

B. The Judge's Comments Go to the Merits of This Case

Judicial bias is ordinarily not presumed merely because a judge has developed views about matters of law, public policy or the general subject matter of a case. Likewise, the mere fact that a judge has expressed himself on a particular point of law or policy is generally deemed an insufficient basis for inferring the type of personal bias which would prevent the judge from being impartial in the trial of a case.[21] See, e.g., U.S. v. State of Alabama, 828 F.2d 1532, 1543-1544 (11th Cir. 1987) (per curiam), cert. denied sub nom., Board of Trustees of Alabama State University v. Auburn University, 487 U.S. 1210 (1988). Unlike the utterance of an opinion as the applicable law or public policy, however, the prior expression of an opinion on the merits of a pending matter is not an activity which the public either expects of judges or has any reason to encourage. Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 Case Western L. Rev. 662, 696 (1985).

Both the litigants and the public have the right to expect that a judge will make an honest assessment of the facts based upon the evidence submitted in each case. Stretton v. Disciplinary Bd. of S. Ct. of Pa., 944 F.2d 137, 144 (3rd Cir. 1991). A judge who has expressed a predisposition as to the merits of a case prior to its filing is not likely to be capable of making such an assessment. See Zavesky v. State, 558 N.E.2d 1124, 1126 (Ind.App. 1990) (bias exists where the judge has expressed an opinion on the merits of the controversy before him).

These cases do not involve the familiar situation in which disqualification is sought on the basis of the judge's view of matters of law or

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[21] But see, e.g., Public Utilities Commission v. Pollack, 343 U.S. 451 (1952)(Frankfurter, J.).

public policy. Rather, they present the highly unusual circumstance of a judge who, in prior cases, made comments which show that he has formed a firm, if not a fixed opinion of the applicable facts of these cases. Thus, while Judge Smith relied on Liteky, supra., in denying disqualification, this case is very clearly distinguishable from Liteky.

In Liteky, petitioners' disqualification motion was based on adverse rulings and remarks the judge had made in a case decided eight years earlier which, petitioners claimed, manifested the judge's "impatience," "disregard for the defense" and generalized "animosity" towards one of the petitioners. 510 U.S. at 541-44. Petitioners complained, for example, that the judge questioned witnesses, limited defense counsel's cross-examination, periodically cautioned defense counsel to confine his questions to material issues, and admonished one of the petitioners that closing argument was not a time for "making a speech."[22]

The complained of remarks were all of the garden-variety kind which judges frequently make while presiding over trials. No claim was (or rationally could have been) made that, during the earlier case, the judge had formed a predisposition as to the outcome of the specific facts that were to be decided in Liteky. Here, in contrast, Judge Smith made comments which demonstrate beyond peradventure that he was not merely "impatient" with the Branch Davidians, but convinced that they intentionally started a gun battle with federal agents and set a fire which resulted in at least 74 deaths. Further according to the judge, these deaths--the culmination of "an American tragedy of epic proportions"--were a result of "suicide and murder inflicted by Davidian on Davidian."[23]

Thus, unlike the judge in Liteky, the judge in this case has made several unambiguous statements from which a reasonable observer could reasonably

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[22] In most of the reported cases dealing with disqualification motions of this type, the motions also were based upon a judge's expression of irritation or frustration with the moving attorney's litigation tactics or in-court conduct; or his questioning of whether the attorney was providing his client with adequate representation. They were not cases like this, in which the motion for disqualification was based upon comments a judge made in an *extrajudicial* forum, in which he speculated about an attorney's *extrajudicial* conduct.

[23] Joint Petition Appendix D at pp. 25a-26a.

infer that he has prejudged their outcome. Certainly, the fact that the judge has made comments of this nature would be likely to leave the public with the impression that this case might be decided because of the judge's prejudgment, rather than through a proper application of impartially determined facts.[24]

C. The Significance of Judge Smith's Role as Fact Finder

Judge Smith will be sitting as the trier of fact on F.T.C.A. claims, and this is a happenstance petitioners have no right to waive. Concerns about judicial bias, or the appearance of such, are particularly acute in situations like this, where the judge is required to fulfill fact-finding functions. See, e.g., Hadler v. Union Bank and Trust Co. of Greensburg, 765 F. Supp.. 976, 979 (S.D.Ind. 1991) (the requirements of § 455(a) become incrementally more stringent when the judge becomes the fact-finder").[25]

D. Fair Judgment is Impossible

In his order denying disqualification the judge candidly conceded that, in forming his opinions of the Branch Davidians and key facts of this case, he relied in part on a series of articles that appeared in his hometown newspaper--the *Waco Tribune-Herald*. He assumed, apparently, that because these were introduced as trial exhibits they did not constitute an "extrajudicial source" for his opinions and remarks.[26] It is far from clear, however, that the mere fortuity that media reports, which the judge undoubtedly initially read and formed opinions about on his own, were ultimately introduced into the Risenhoover

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[24] In this light, Judge Smith's subjective view that he will be able to put aside his prior views and impartially weigh and evaluate new evidence which shows that his prior factual opinions were wrong is not entitled to any weight.

[25] Similarly, some courts, in denying disqualification, have taken pains to emphasize that a jury will be acting as the finder of fact, thus reducing the possibility that the public will perceive that a partial judge will be called upon to make important credibility determinations. See, e.g., Piechowicz v. United States, 885 F.2d 1207, 1211 (4th Cir. 1989).

[26] Joint Petition Appendix C at pp. 17a-18a. The judge did not discuss at all the other extrajudicial source of information petitioners alleged in their motion--his ex parte contacts with members of the A.U.S.A.'s office--nor did he analyze the significance of his having made extrajudicial remarks regarding those contacts while dining with his brother. Joint Petition Appendix C, Exhibit 1.

record automatically converted them from an 'extrajudicial' to an 'intrajudicial' source.

Assuming *arguendo* that the newspaper articles did constitute an intrajudicial source for the judge's comments and opinions, disqualification would nevertheless be warranted. That is so because this Court made it clear in Liteky that even opinions and remarks which have a wholly judicial source will support a bias challenge "if they reveal such high degree of favoritism or antagonism as to make fair judgment impossible" [Liteky, 510 U.S. at 555]. In fact, the factually similar Berger case was cited as an example of just such a situation.

In Liteky this Court did not expressly say from whose standpoint the question of whether the complained of comments reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible" is to be determined. In keeping with the express intent of the statute, however, the amicus curiae assumes that the Court would hold that disqualification is warranted under § 455(a) whenever a reasonable person would believe that such is the case. From the affidavits submitted by Ms. Haldeman and Mr. Doyle, it may be inferred that both of them strongly believe that the judge's comments revealed such a "high degree of favoritism." Petitioners also appended as an exhibit, at the trial court and Fifth Circuit, a letter sent to Judge Smith on July 8, 1997 by one of petitioners' counsel, Ramsey Clark. In that letter the former U.S. Attorney General stated, among other things, that because the judge held "adverse opinions on the controlling issues of fact" a reasonable person could not expect him to conduct a fair trial.[27]

But perhaps the best evidence of whether a reasonable person would believe that the judge's comments reveal such a high degree of animosity as to make fair judgment impossible is the affidavit provided by the U.S. v. Branch jury forewoman, Sarah Bain.[28] Ms. Bain testified that Judge Smith was

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[27] Appendix D to the Amicus Curiae Brief. This letter was part of the trial court and Fifth Circuit record.

[28] In his instructions to the jury, Judge Smith said: "[t]his Court recognizes that each of you is a reasonable person, capable of making appropriate decisions based simply on your collective common sense and experiences." Appendix E to Amicus Curiae Brief at p. 12a. This was part of the trial court and Fifth Circuit record in petitioners' case. If Ms. Bain was reasonable enough to act as foreperson of the jury which had

not only "antagonistic" to the Branch defendants, but had "come to scorn" them. She further accused Judge Smith of "deep prejudice" against the religious sect, and set forth under oath her considered belief that:

> any reasonable person reviewing all the facts fairly would have grave doubts, as I do, about the ability of Judge Smith to preside impartially over a trial in which the rights of the Mt. Carmel Church and its members are being asserted against the U.S. government....[29]

In opposing the motion to disqualify the government adduced no evidence to rebut petitioners' claims that a reasonable person would question Judge Smith's impartiality.

III. REASSIGNMENT ON REMAND

If the standard a trial court is to employ in deciding a disqualification motion has not always been as clear as a mountain lake in springtime,[30] the standard by which appellate courts are supposed to determine whether reassignment on remand would be "just under the circumstances" approaches the Kafkaesque. Consider, by way of example, U.S. v. Tucker, 78 F.3d 1313, 1325 (8th Cir. 1996). Special Prosecutor Kenneth Starr requested, on appeal, that the case be assigned upon remand to a different judge. In opposing reassignment appellees argued, inter alia, that the OIC had no standing to make

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been charged with the task of deciding whether the Branch defendants were innocent or guilty of murder, it would seem fair to assume that she was capable of forming a reasonable opinion as to whether Judge Smith, in presiding over that case, had manifested biased towards them.

[29] Joint Petition Appendix K at pp. 65a-66a. Ms. Bain was, of course, not a party to the Branch proceedings. If her percipient witness impression of Judge Smith's conduct towards the Branch Davidians is insufficient to establish that he possessed the requisite degree of antagonism, it is difficult to imagine how any petitioner could satisfy the Berger test.

[30] See, e.g., Roberts v. Ace Hardware, Inc., 515 F. Supp. 29, 30 (N.D.Ohio 1981)(noting that it "is not so easy as the Congress and the Court of Appeal seem to think it is to determine what a 'reasonable person knowing all the relevant facts' would think about anything, much less about the impartiality of a judge").

such a request. An Eighth Circuit panel professed "every confidence" that the challenged judge would "handle the case in a fair and impartial manner;" nevertheless, it "conclude[d] that this request must be granted to preserve the appearance of impartiality." A couple of months later the Eighth Circuit denied appellees' Petition for Rehearing *En Banc*. 82 F.3d 1423, 1424 (8th Cir. 1996). However, two dissenting judges complained that the standard by which the Eighth Circuit panel had remanded the case for reassignment "lack[ed] any precedential or statutory foundation and establishes an unworkable guideline defining what constitutes the appearance of partiality."[31]

Because of lingering confusion over the appropriate standard for determining a request for reassignment, it is probably safe to assume that no two circuits treat such requests exactly alike. Indeed, while some circuit courts, including the Ninth, have ordered reassignment on multiple occasions, others have remanded cases to new judges only in "extreme" or "unusual" circumstances. Still other courts, while suggesting that reassignment would be appropriate under the circumstances, have nevertheless declined to order this relief;[32] or have remanded to the lower court for its own consideration of whether reassignment was warranted. See, e.g., O'Rourke v. City of Norman, 875 F.2d 1465, 1475 (10th Cir. 1989).

There has not only been a split among the circuits, but between different panels of the *same* circuit.[33] The Fifth Circuit's own experience in dealing

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[31] Ironically, the dissenters most vehement complaints concerned the "[r]eliability of the evidence" -- primarily newspaper articles -- upon which the reassignment request was based. They noted that, in the context of § 455, the Eighth Circuit had "been extremely skeptical of press reports as a basis for a finding of partiality" and had recognized "the great potential for the media to generate inaccurate or misleading information." They further pointed out that "[t]he practice of relying on newspaper and magazine articles as proof of substantive fact has no support in the rules of evidence." 82 F.3d 1423 at 1428.

[32] See, e.g., Thompson v. Buford Tp., 445 N.W.2d 303, 306-307 (N.D. 1989).

[33] Compare, e.g., U.S. v. Roberts , 88 F.3d 872 (10th Cir. 1996) (reaffirming court's "extreme reluctance to exercise our inherent authority to reassign a district court judge on remand") with Nicholas v. Alley, 71. F.3d 745 (10th Cir. 1995) (ordering reassignment); Women's Care Services, P.A. v. Operation Rescue, Nat'l, 24 F. 3d 107, 110 (10th Cir. 1996)(same); and Mitchell v. Maynard, 80 F.3d 1433 (10th Cir. 1996) (reassigning case despite concluding that the judge harbored no personal bias).

with reassignment requests provides a case in point. In In re Corrugated Container Antitrust Litigation, 752 F.2d 137 (5th Cir. 1985), cert. denied, 473 U.S. 911 (5th Cir. 1985), a Fifth Circuit panel held that while appellate courts do have authority to remand cases to other judges in order to avoid even the appearance of bias, "such mandatory reassignments should be made infrequently and with the greatest reluctance." In more recent cases, however, other panels of the same court have expressed little reluctance to order reassignment in circumstances where such a course of action appeared just. [34]

This dichotomy may be attributed to a confusion as to the proper standard for deciding the merits of a reassignment request. In ordering reassignment in Simon v. Clute, 825 F.2d 940 (5th Cir. 1987), the Fifth Circuit appeared to adopt the three-part test that was first announced in U.S. v. Robin, 553 F.2d 8, 10 (2d Cir. 1977).[35] However, when the appropriate reassignment test was considered again by that court in Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997), the panel, apparently unaware that the Fifth Circuit had adopted the Robin standard in Clute, observed that whereas some circuits had adopted Robin's three-part test, others had invoked their statutory powers to reassign whenever the facts "might reasonably cause an objective observer to question [the judge's impartiality.]" and the court did not decide which applied

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[34] In United States v. Jordan, 49 F.3d 152, 160 (5th Cir. 1995), the appeals court directed the Chief Judge of the Fifth Circuit to assign the case to another judge outside of the trial judge's district for resentencing, saying:

> ... we want to avoid placing one of her colleagues in the uncomfortable position of effectively passing on her rulings in the sentence hearing. Moreover, having one of her own colleagues in her district pass on her past actions well might, in and of itself, exacerbate the appearance of impropriety. Id. at 160, n.18.

See also United States v. Anderson, 70 F.3d 353 (5th Cir. 1995) (court found no violation of the Sixth Amendment or the Due Process Clause, yet ordered that the sentence imposed by the district court be vacated and that the Chief Judge for the Northern District of Texas assign the case to a different judge for resentencing).

[35] Curiously, neither court made mention of the In re Corrugated Container Antitrust Litigation panel's concern that reassignment should be ordered only "reluctantly."

in the Fifth Circuit.[36] 120 F.3d 1307 (5th Cir. 1997), citing inter alia, United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C.Cir. 1995), quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988). The Johnson court neither cited Clute nor said what was the appropriate Fifth Circuit standard for reassignment.

Shortly before the Johnson panel issued its order granting reassignment, the panel in this case below implicitly denied petitioners' reassignment request in a two-line order. It did not say whether it had determined petitioners' request was insufficient to warrant the requested relief under the In re Corrugated Container Antitrust Litigation standard, the Clute standard, the Jordan/Anderson standard, or some other standard; or whether it had simply failed to entertain the request at all. Likewise, in its August 5, 1997 order denying petitioners' Request for Rehearing *En Banc*, the Fifth Circuit gave no hint as to the standard it employed in determining petitioners had not established a right to reassignment.

Meanwhile, in between the time the Fifth Circuit denied petitioners' petition in these cases and the time it denied *en banc* review, yet *another* Fifth Circuit panel weighed in on the propriety of reassignment in In re John H. McBryde, 117 F.3d 208 (5th Cir. 1997). In that case the court granted a petition for a writ of mandamus, the intended effect of which was to return to the district judge two cases which the Chief Judge of the District Court had reassigned away from him.[37]

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[36] The argument that reassignment is appropriate whenever the facts "might reasonably cause an objective observer to question the judge's impartiality" would appear to do no more than restate the enumerated grounds for seeking disqualification under § 455(a). Since the basis for appellate reassignment is not judicial bias--apparent or actual--but rather the belief that the healthy administration of the judicial process would best be served by reassignment [Offutt v. United States, 348 U.S. 11, 16-18 (1954)], this "test" appears too narrow. Likewise, insofar as Robin and its progeny purport to require the party seeking reassignment to show more than that would be "just in the circumstances," the standard set forth in those cases seems too rigid.

[37] However, the Fifth Circuit's Judicial Council, having concluded that the Chief Judge's action in reassigning the cases was correct, filed a motion with the Circuit on July 22, 1997 requesting a stay of the order returning the cases to Judge McBryde until the propriety of the order of reassignment could be considered by this Court. Texas Lawyer Magazine (August 4, 1997 at p.3).

The Fifth Circuit experience demonstrates that the circuit courts are in dire need of guidance on this important issue.[38] However, this Court's own view as the propriety of reassignment is not entirely clear. In fact, in Liteky, this Court expressly left open the question of whether appellate courts have the supervisory power to grant reassignment for reasons which would not be sufficient to compel the grant of a disqualification motion. 510 U.S. at 554-55. Because this is so, and because questions about the propriety of ordering reassignment are not only certain to recur, but actually recurring on a regular basis, this Court should take this opportunity to set forth the appropriate standard for determining whether applications for reassignment should be granted.

IV. ADDITIONAL POLICY CONCERNS

In deciding whether disqualification (or reassignment on remand) is appropriate in a particular case, it is important for the court to weigh all of the countervailing policy concerns. In these cases, these would appear to augur in favor of disqualification or reassignment.

First, as this Court eloquently stated in Offutt v. United States, 348 U.S. 11, 14 (1954), it is vital that "justice must satisfy the appearance of justice." Such is never more the case than in a high profile case like this, in which the government is itself on trial; and the petitioners (as well as a sizable contingent of the public at large) have expressed serious doubts about the impartiality of the justice system. See U.S. v. Tucker, supra, ("[g]iven the high profile of the Independent Counsel's work and of this case in particular...assignment to a different judge on remand is required to insure the perception of impartiality.")

Another policy concern is that courts should not unduly infringe upon the clear intent of Congress to foster the public's confidence in the judicial process. As this Court noted in Liljeberg v. Health Services Acquisitions Corp., 486 U.S. 847, 858 n.7 (1988), Congress amended § 455 in 1974 to "clarify and broaden the grounds for judicial disqualification." The purpose of those amendments was "to promote public confidence in the integrity of the

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[38] At a minimum the circuit courts should be advised of whether they (unlike the panel below) must set forth their reasons for denying a petitioner's reassignment request, so that this Court can determine on review whether the appropriate reassignment standard was employed.

judicial process." Id. at 860.[39] The public's confidence in the integrity of the judicial process would be shaken, and certainly in no way advanced, by insisting that a judge who has previously decided the dispositive facts of these cases adjudicate those same facts again here.

Another policy concern is one of administrative convenience. It could be argued that there would be some slight judicial economy in having a judge who is already familiar with the basic facts of these cases preside over it. However, in deciding that the challenged judge should have recused himself in Berger this Court made it clear that, by so doing:

> ...there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside.... 255 U.S. at 233.

The same is true here. Neither the government nor Judge Smith has so much as suggested that it would be difficult to locate another suitable judge to handle these cases, and there appears to be no compelling policy reason for Judge Smith to insist upon handling them himself. See Nicholas v. Alley, 71. F.3d 745 (10th Cir. 1995)("We have also balanced the possible question of impartiality by a reasonable person against the relative ease of replacing Judge Alley with an available judge from a very large pool of judges outside the State of Oklahoma.")

Yet another factor courts sometimes consider in deciding disqualification applications is whether it appears the motion was interposed as a means of obtaining delay or for the purpose of "forum shopping." In these cases, these factors clearly did not come into play. Since petitioners are plaintiffs, delay is not in their interest. In any event, the motion was filed almost immediately

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[39] With the enactment of the 1974 amendments to § 455, the "duty to sit" rule which formerly prevailed in the federal courts was replaced by a presumption of disqualification. See, e.g., In re A.H. Robins Co., Inc., 602 F. Supp. 243, 245 (D.Kan. 1985). Thus, since 1974 it has generally been agreed that, in situations where there is a "close call," any doubts about disqualification are to be resolved in favor of disqualification. See, e.g., United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989). When it comes to whether a reasonable observer would harbor doubts about Judge Smith's ability to remain impartial as the trier of fact, this is certainly a case in which there is at least a "close call."

after Judge Smith was assigned to these cases. Likewise, the motion cannot seriously be characterized as an attempt by petitioners to "forum shop." Petitioners have repeatedly averred that they would be willing to have the case presided over by *any* other randomly assigned judge in the Southern or Western Districts.

The only policy concern identified by Judge Smith in denying disqualification was that "[a] judge must also be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of an anticipated adverse decision." He speculated that the motion may have been "an attempt to avoid a ruling on Defendants' motions to dismiss and for summary judgment because motions raising similar issues were for the most part decided counter to plaintiffs' interests" by Judge Smith in Gyarfas v. United States, et al., Civil Action No. W-95-CA-022.

It is true that a judge who has been called upon to decide a disqualification motion may consider whether those who question his impartiality are merely seeking to avoid the adverse consequences of having a judge who does not favor their position remain on the case. However, the suspect view of a disqualification motion must be balanced against the paramount importance of avoiding the appearance of bias or impropriety. See, e.g., Potashnick v. Port City Const. Co., 609 F.2d 1101, 1114 (5th Cir.)(any question of a judge's impartiality threatens the purity of the judicial process and its institutions"), cert. denied, 449 U.S. 820 (1980).

CONCLUSION

The Petition for Writ of Certiorari should be granted and the Order of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

Richard E. Flamm
600 Grand Avenue, Suite #410
Oakland, CA 94610
Telephone: 510-444-3075
Facsimile: 510-836-8927

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL ACTION NO.
	*	W-93-CR-046(2) (3)
VS.	*	(4) (5) (6) (7) (8) (9)
	*	(10) (11) (12)
BRAD EUGENE BRANCH,	*	
KEVIN A. WHITECLIFF,	*	
JAIME CASTILLO,	*	
LIVINGSTON FAGAN,	*	
PAUL GORDON FATTA,	*	
GRAEME LEONARD CRADDOCK	*	June 16-17, 1994
RENOS AVRAAM and	*	
RUTH OTTMAN RIDDLE	*	San Antonio, Texas

* * * * * * * * * * * * * *

BEFORE THE HONORABLE WALTER S. SMITH, JR.,
JUDGE PRESIDING

SENTENCING

* * * * * *

MR. TINKER: . . . I do know that Your — as Your Honor mentioned, that members of the public have written in an effort to hopefully assist Your Honor and — and demonstrate what the public feeling is. Whether or not Your Honor feels that was a concerted effort by people who represent the — the accused and the Defendants in this case, I don't know. But, in any event, we know what the jury would do. . . .

* * * * * *

THE COURT: It's a concerted effort by people who are so anti-government that they would take that position anywhere, any time.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEBBORAH BROWN, et al,	*	
	*	
Plaintiffs,	*	
	*	DOCKET NO. W-96-CA-142
-VERSUS-	*	
	*	JUDGE WALTER S. SMITH, JR.
UNITED STATES OF AMERICA, et al.,	*	
	*	
	*	
Defendants.	*	
	*	

STATE OF TEXAS }
} ss
COUNTY OF }

AFFIDAVIT OF CLIVE DOYLE

Before me, the undersigned authority, personally appeared Clive Doyle, who, being by me duly sworn, deposed as follows:

1. My name is Clive Doyle. I was a defendant in United States v. Brad Eugene Branch, et al., W-93-CR-146. I was found not guilty of all charges against me.

2. I have been a member of the Seventh Day Adventist Church since 1951 and of the Mt. Carmel Church since 1957. I am a plaintiff in this civil suit, suing for the death of my youngest daughter, Shari, age 18, whom I was unable to save during the fire on April 19, 1993.

3. I have been asked by my lawyers to give this affidavit in support of a motion by plaintiffs asking that Judge Walter S. Smith, Jr., be disqualified from presiding over the case.

4. I thought Judge Smith was prejudiced against the defendants, our Church and religion from the time he selected the jury through the time he sentenced those defendants who were convicted of some minor charges. He did all the questioning of prospective jurors and asked questions like whether they belonged to main stream churches which reinforced the prejudice caused by his characterization of our religion as a cult and our Church as a compound. At trial he seemed to rule for the government on all important issues and he effectively prevented us from presenting evidence of self defense which made his final instructions on self defense on the murder counts not worth much. I never detected any concern on his part for the deaths of our children, families, Church and property but he was compassionate about the deaths of the four ATF agents. He didn't seem to be concerned about the way the government attacked our Church, knowing it was full of people, mostly women and children.

5. At the sentencing Judge Smith's prejudice seemed to run away with him. He went far beyond any evidence I heard and said things I know are not true when he said our religious beliefs taught that we "must bring about a violent conflict with federal agents." Our religious belief never caused us to want to bring about a violent conflict with federal agents, or anyone else. David Koresh never preached we should go looking for a fight with anyone. The ATF came after us. We had lived peacefully as a Church group in Waco for years without any trouble. We didn't go after them. All the evidence shows that. We didn't start the fire in the Church and our members didn't kill each other or commit suicide. Our religion is against suicide and we never discussed it. The fact that Judge Smith made all those statements as fact shows how prejudiced he is against us, just like his sentencing five church members acquitted of murder to 40 years as if they had been convicted.

6. Since our trial, Judge Smith has written and said things that reveal some great prejudice and hatred toward our Church and religion. He has said the press should have known how dangerous we were before February 28, 1993. We weren't and nobody thought we were, as far as I know. I consider we were on good terms with both the Sheriff's Office and the Police Department and there was no reason for them to consider us dangerous.

7. Judge Smith never attended our Church, met its members, heard our Bible discussions, sermons, or participated in our religious studies, yet he says our religious teachings did not focus on the Golden Rule, but on paramilitary training. The Golden Rule was read and discussed in the Church,

probably everyday by someone, and probably more than any church Judge Smith ever attended. We believe in the Golden Rule and try to practice it.

8. Paramilitary training was never a part of our religious teaching. Our religious teaching comes from the Bible. A few of the men bought and sold guns and helped support the Church with the proceeds. Guns were also kept to protect the Church and its members. We live on earth, in Texas, and guns are part of the culture. The Bible teaches that there will be violent conflict on earth in the last days and that forces of evil will combat forces of good, but we never sought, or wanted violence, or combat and were not some kind of National Guard, or organized militia. We were religious people, studying, praying and living together in the exercise of our religion. We came from all over the world for that purpose. We loved our lives at Mt. Carmel. If we hadn't, we could have and would have left, just as others had done in the past.

9. For Judge Smith to see the Church as a fortress, or a fort style building, is a reflection of his prejudice. No fortification expert would consider it a fort. It was a religious community center built pretty much with our own hands to serve our religious and living needs. For Judge Smith to write that David Koresh had "exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples" reveals his ignorance and prejudice. Why the subject is proper for a legal opinion is not clear, but if the Judge wants to write about our religion he ought to study it and hear what those in the Church say so he could know what he is writing about. I don't know where he gets his facts, but he has become a major part of the effort of the government to demonize our religion and Church.

10. For Judge Smith to decide David Koresh is a "false prophet" in a case in which the Church cannot even defend itself is to set the courts above religion to decide what is true religion and what is false. We believe David Koresh was a true prophet.

11. I do not believe it is possible for us plaintiffs who are members, or relatives of members of the Mt. Carmel Church and believe in its religious teachings, and who seek justice and truth for the memories of our children, relatives and friends who died there, can possibly get a fair trial

before Judge Smith. I believe it is important to freedom of religion and the integrity of the governments of the United States and of Texas that we get a fair trial and that the world believe it is intended to be fair.

/s/ Clive Doyle

SWORN TO AND SUBSCRIBED before me
on the 28th day of May, 1996.
My commission expires: 4-25-2000
NOTARY PUBLIC, State of Texas
(Sharon Swartz)

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEBBORAH BROWN, et al,	*	
	*	
Plaintiffs,	*	
	*	DOCKET NO. W-96-CA-142
-VERSUS-	*	
	*	JUDGE WALTER S. SMITH, JR.
UNITED STATES OF AMERICA, et al.,	*	
	*	
Defendants.	*	

STATE OF TEXAS }
} ss
COUNTY OF }

AFFIDAVIT OF BONNIE CLARK HALDEMAN

Before me, the undersigned authority, personally appeared Bonnie Clark Haldeman, who, being by me duly sworn, deposed as follows:

1. My name is Bonnie Clark Haldeman. I am the mother of David Koresh, the mother-in-law of Rachel Jones Koresh and the grandmother of Cyrus Ben Joseph Howell, deceased; Star Hadassah Howell, deceased; Serenity Sea Jones Koresh, deceased; Dayland Lord Gent, deceased; Paiges Gent, deceased; Bobbie Lane Koresh, deceased; Chica Jones Koresh, deceased; Little One Jones Koresh, deceased; Startle Summers, deceased, Chanel Andrade, deceased; and Mayana Schneider, deceased. I am a plaintiff in this case and bring suit for the deaths of my son and my grandchildren as well as for myself. I have been a member of the Mt. Carmel Church for many years and was raised as a Seventh Day Adventist.

2. I have been asked by my lawyers to give this affidavit in support of a motion by plaintiffs asking that Judge Walter S. Smith, Jr., be disqualified from presiding over the case.

3. The only reason for the existence of our Church was for religious purposes. Mt. Carmel was a place of Bible study and worship. A great part of each day was spend in Bible readings and discussions. It was for the purpose of studying the Bible that members came from many countries. In order to facilitate this study many made Mt. Carmel their temporary home.

4. We never considered ourselves a "cult." We understood this was a very negative term. We believed in the right of everyone to choose the religion they believed in. Our faith was a subject of constant discussion and analysis. Our members were free to choose and exercise their religious faith. This created vital religious discussion and deep faith.

5. We never heard the Church center called a compound until this tragedy. It was a religious center for worship, living, work, education and recreation. It is outrageous and ridiculous, and certainly contemptuous, to call the center a fortress. It was church and home. To say the "fort style" of the Church was a reflection of David's apocalyptic mentality is not at all true. Many people contributed to the way the Church building grew, like Topsy perhaps, but serviceable for religious services and studies with its large chapel and adjacent areas for study and prayer; for living with large kitchen and dining room areas and small private family quarters with a gym, pool and outdoor areas and equipment for recreation. It was made of cheap wood, homemade construction and not fancy, but we loved it.

6. David was a serious Bible scholar from childhood. He read and discussed the Bible and religion constantly. It was real and important to him. He could quote more, and more accurately, from the Bible than anyone I ever knew. After all he was surrounded by people who read the Bible every day often for hours. Of course David was thoroughly familiar with the Golden Rule and often discussed it. He believed in it. Judge Smith doesn't know anything about David's religion and has no basis to condemn it or to call it paramilitary, or to call David a false prophet. Our Church believes in prophecy and prophets. We search the Bible for the truth. We love our children, try to teach them to be good people and Judge Smith has no right to judge David or our religion. We will let the Lord tell us who the true prophets are.

7. David changed his name from Vernon Wayne Howell to David Koresh, under God's guidance, partly because of Bible prophecy having to do with the last days, and partly to help forward his religious music. The name David Koresh had symbolic meaning for this time. He changed his name legally down at the Courthouse. Judge Smith has no right to place a slur on his

choice of name, and shows prejudice by so doing. I accepted David's new name and believe that all the other Church members did as well.

8. Judge Smith's claim that David had exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples shows a lack of understanding of our religious beliefs. His statement is a malicious insult to all Church members and our religion, designed to make us appear licentious and duped. No decent person would spread these prejudicial statements around without seeking to study and understand the truth for our Biblical point of view.

9. I have followed Judge Smith's words and acts since the tragedy at Mt. Carmel and believe he is deeply hateful of our religion, our Church and even our dead. I do not believe our Church, religion, our Members who died in this tragic assault by government, including my son and grandchildren can possibly get a fair trial before Judge Smith, or that any reasonable and knowledgeable person would believe we could.

/s/ Bonnie Clark Haldeman

SWORN TO AND SUBSCRIBED before me
on the 23 day of May, 1996.
My commission expires: 6-4-96
NOTARY PUBLIC, State of Texas
(Marilyn Lust)

APPENDIX D

RAMSEY CLARK
LAWRENCE W. SCHILLING

LAW OFFICES
36 East 12th Street
New York, N.Y. 10003
(212) 475-3232
FAX (212) 979-1583

April 23, 1996

Hon. Walter S. Smith, Jr.
United States District Judge
United States Courthouse
800 Franklin Avenue
Waco, TX 76701

Federal Express

Dear Judge Smith,

I write on behalf of all the plaintiffs in the several civil actions involving claims for wrongful death and injury at the Mt. Carmel Church in 1993 which have been transferred to your court from Houston.

Plaintiffs and their counsel believe that justice, the appearance of justice and public confidence in the impartiality of the judiciary require trial at a place and before a judge free of the inherent and inescapable prejudices that permeate the Waco community concerning this tragic history and its aftermath.

Most plaintiffs sued in Houston for these reasons. Judge Atlas has decided venue is not proper there but declined to rule on transfer within the Western District and assignment of a new judge.

In meetings last Thursday and Friday with plaintiffs in Waco to attend the third anniversary services for those who died there, their views and instructions to counsel were unanimous and firm that transfer of the proceedings to San Antonio or Austin, and trial before a new judge are essential to their quest for justice.

Counsel concur and are preparing motions for such relief. We hope to be able to file them by May 6. We respectfully request that you rule on these motions before taking any other action in these cases.

This time is required to review the records for this purpose in the Branch criminal trial, the Reisenhoover case, other cases and research the extensive media coverage concerning these matters.

Our concerns arise in part from statements by you expressing your personal opinions that the Church members started the April 19th fire, that they ambushed the ATF and fired first on February 28, that adult Church members engaged in a conspiracy to cause the deaths of federal agents, that all but a handful of the Church members were killed by suicide and murder inflicted by "Davidian upon Davidian," that the media knew how dangerous sect leader David Koresh and his followers were even before February 28 and from your many characterizations of unrelated alleged criminal acts by Church members such as credit card fraud and sexual abuse of minors and your frequent negative comments about their Church doctrine such as it being focused on paramilitary training, and not focused on the "Golden Rule" and that David Koresh was a "false prophet."

Many of these statements reveal that you hold adverse opinions on controlling issues of fact in our cases, facts which were previously either not controlling or not at issue, and at the very least these statements will create an impression among reasonable persons that the plaintiffs might not get a fair trial in the civil actions which will involve trial by jury of claims against individual defendants and a bench trial of claims against the United States under the Federal Tort Claims Act.

We mention these few illustrations of our concern to urge you to consider whether you should recuse yourself under the provisions of 28 U.S.C. § 455(a) because your impartiality might reasonably be questioned. We make this point with an appreciation of the fairness with which you acted in the Branch criminal case in taking judicial notice of bias in the Waco community against the Mt. Carmel Church and transferring the case to San Antonio because of that.

If after consideration, you decide to recuse yourself and transfer the proceedings to San Antonio or Austin in the interest of justice, we believe you would render a great service to history and the judiciary. It is too much to expect the public or posterity to ever believe that the interests of justice can be served or the appearance of impartiality preserved by a trial in Waco or in which you preside.

Please have your clerk advise us if May 6 is not a reasonable time for filing these motions and if you decide to take action under § 455 on your own motion.

Sincerely,

/s/ Ramsey Clark

cc: Marie L. Hagen, Esq.
Joseph Sher, Esq.
Reed Lockhoof, Esq.
Dickie Grigg, Esq.
Martha Dickie, Esq.
All plaintiffs' counsel
(BY FAX)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No. W-93-CR-046
	§	
BRAD EUGENE BRANCH (2),	§	
KEVIN A. WHITECLIFF (3),	§	
CLIVE DOYLE (4),	§	
JAIME CASTILLO (5),	§	
LIVINGSTON FAGAN (6),	§	
PAUL GORDON FATTA (7),	§	
WOODROW KENDRICK, also	§	
known as BOB KENDRICK (8),	§	
NORMAN WASHINGTON	§	
ALLISON, also known as DELROY	§	
NASH (9), GRAEME LEONARD	§	
CRADDOCK (10), RENOS	§	
AVRAAM (11), and RUTH	§	
OTTMAN RIDDLE (12)	§	

COURT'S INSTRUCTIONS TO THE JURY

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This Court recognizes that each of you is a reasonable person, capable of making appropriate decisions based simply on your collective common sense and experiences. However, our society is, and must be, ruled by law and not by men. Thus it would violate the very linchpin of our judicial system if you were to render a decision not based on the law as I am now explaining it.

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